



**46TH ANNUAL INDIANA
CONSORTIUM
of
STATE AND LOCAL HUMAN RIGHTS
AGENCIES CONFERENCE**

PRESENTED *by:*



PREPARING AN EMPLOYMENT CASE FROM A TO Z

Meghan U. Lehner, Esq.

CLEVELAND LEHNER CASSIDY

www.clcattorneys.com

CAREFUL CASE SELECTION

- Does the potential client have viable claims?
- Is the potential client articulate and believable?
- Are there any witnesses to support the client's claims?
- What documents exist to support the client's claims?
- Does the client have good damages?
- Is the client up for litigation?
 - Can the client give the emotional, time, and monetary investment necessary for success?

INITIAL CONSULTATION

- Employment History
 - Current or former employee
 - Name and address of employer
 - Date of hire
 - Date of termination
 - Reason for termination
 - What does client think is the real reason for the termination?
 - Identify supervisors and decision makers
 - Disciplinary history

INITIAL CONSULTATION – DAMAGES & MITIGATION

- Benefits
 - Salary / Rate of pay
 - Overtime opportunities
 - Bonuses & Commission (look out for potential wage claims)
 - Insurance
 - 401k and other benefits
- COBRA Costs
- Mitigation
 - Unemployment compensation
 - New employment – date and rate of pay
 - Is the client diligently and in good faith looking for replacement employment

INITIAL CONSULTATION – LEGAL ACTION TO DATE

- Internal complaint
 - Can internal complaint be categorized as protected activity?
 - Was supervisor/decision maker aware of the complaint?
- EEOC or ICRC complaint
 - Date
 - Was the Charge filed timely (300/180 days)
 - Basis for Charge
 - Resolution
 - Right to Sue Issued
 - Date

INITIAL CONSULTATION — KEEP AN EYE OUT FOR ...

- Severance agreement
- Bankruptcy
- SSI Disability
- Criminal records
- Warrants
- Protective Orders

INITIAL CONSULTATION — DOCUMENTS CLIENT MAY HAVE

- Termination letter
- Performance evaluations
- Written discipline
- Pay stub or other evidence of damages
- FMLA paperwork or other medical documents
- Internal complaints or EEOC/ICRC complaints
- Requests for accommodations
- Emails, text message, social media messages
- Client notes

INITIAL CONSULTATION – CLIENT GOALS

SET REASONABLE EXPECTATIONS

- Reinstatement (unlikely)
- \$
- Termination changed to resignation
- Neutral reference
- Buyout – in the case of current employee
- Attorneys' fees

INITIAL CONSULTATION – CLIENT MEETING

- Bring all relevant documents
- Request client draft narrative/timeline of events
- Damage calculation
- Fee agreement
- Counsel client re. use of social media and obligations to look for comparable employment

PRELITIGATION SETTLEMENT ATTEMPTS

“Make settlement demands early and often.”

Magistrate Judge Denise K. LaRue

- Letter to employer
 - EEOC/ICRC may not let the employer know that employee is represented by counsel
 - Especially important when representing a current employer
 - Remind employer not to retaliate
 - Evidence preservation responsibilities
 - Settlement demand
 - Especially prudent if current severance offer pending

FORUM — WHERE SHOULD YOU FILE YOUR CLIENT'S COMPLAINT?

- ICRC vs. EEOC
 - Number of employees
 - State v. Federal statute
 - Age & retaliation claims
- Federal Court
 - Within 90 days of Right to Sue being issued

ADMINISTRATIVE PROCESS

- Charge of Discrimination
 - Type[s] of discrimination
 - Adverse action[s]
 - Decision makers
 - Comparators
 - Previous protected activity
- Position Statement
- Interview/Rebuttal
 - Advance copies of key evidence
 - Follow up email
- Witness statements
 - Know who you can talk to
- Settlement Demand
 - Adjust based on new employment
- RTS
 - 90/180 days
- FOIA

SETTLEMENT AGREEMENTS

- Tax treatment and indemnification
- Neutral reference
- Confidentiality
- Non-disparagement
- No rehire
- Liquidated damages
- OWPBA

FILING SUIT

- Federal court vs. state court
- Additional Claims
 - Wage/FLSA claims
 - FMLA
 - State law claims – Breach of K, IIED, *Frampton*
- 18 month tract in federal court
- *Iqbal/Twombly* pleading standard – “plausible” claim
- Affirmative defenses

DISCOVERY — INTERROGATORIES & RFAs

- Reason for termination
- Identity of decision makers
- Replacement
 - Outside of the protected class?
 - Qualifications/experience

DISCOVERY – RFPs

- Personnel files
 - Client
 - Comparators
 - Decision makers
 - Replacement
- Similar complaints by other employees
- Benefit information
- Employer's insurance information

DISCOVERY — THIRD PARTY REQUESTS & DEPOSITIONS

- 3rd Party RFPs
 - Union
 - Medical providers
 - Third party benefits administrator

- Depositions
 - Prep your client
 - Decision makers
 - Rule 30(b)(6) deposition
 - Client's MD

BUILDING YOUR CASE & SURVIVING SJ

- Direct evidence of discrimination
- Indirect/McDonnell Douglas Burden Shifting Approach
 - *Prima facie* case of discrimination
 - Legitimate non-discriminatory reason
 - Pretext
 - Comparators
 - Suspicious timing
 - Ambiguous statements
- *Ortiz v. Werner Enterprises* (7th Cir. 2016) - “[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the ‘direct’ evidence does so, or the ‘indirect’ evidence.” J. Easterbrook

COMPARATORS

- Same decision maker, not necessarily same supervisor
- Subject to same standard of conduct
- Similar misconduct
- Similar enough to your client to permit a reasonable inference of discrimination

“BUT FOR” STANDARD

- ADEA
 - ADA
 - Retaliation
-
- Title VII – Motivating factor standard

ADA – SPECIAL CONSIDERATIONS

- Definition of Disability
 - Physical or mental impairment
 - Substantially limit major life activity
 - Essential functions of the job
 - Record of disability
 - Regarded as disabled
- Reasonable accommodation
 - Interactive process
 - Undue hardship

SEXUAL HARASSMENT — SPECIAL CONSIDERATIONS

- Quid pro quo
 - Supervisor
 - Adverse Action
 - Strict liability
- Hostile work environment
 - Severe or pervasive
 - Protected activity
 - Harassment continues
- Third party harassers